91-265

Supreme Court, U.S.
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No. 91-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

POTOMAC EDISON COMPANY,
Petitioner,

v.

JOE D. HELMICK, TAMMY HELMICK,
and CARL BELT, INC.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the trial of this personal injury action a jury determined that petitioner was only 40% responsible for injuries sustained by the plaintiff, while respondent Carl Belt, Inc. (plaintiff's employer) was 60% responsible for those injuries. Nonetheless, under West Virginia's bizarre system of comparative negligence, coupled with joint and several liability, and immunity for workers' compensation employers from third-party contribution claims, petitioner was saddled with all of the plaintiff's damages, without any recourse against the employer and without any credit for the plaintiff's receipt of workers' compensation benefits. The question presented is whether this aspect of West Virginia's system of tort liability is arbitrary and irrational, in violation of the Fourteenth Amendment's Due Process and Equal Protection Clauses, as other state courts of last resort have held.

LIST OF PARTIES AND RULE 29.1 LIST

With the exception noted below,* the parties in the Supreme Court of Appeals of West Virginia are those parties listed in the caption of this Petition. Because of the potential applicability of 28 U.S.C. § 2403(b) to this Petition, copies have been served upon the Attorney General of West Virginia. Supreme Court Rule 29.4(c).

Petitioner Potomac Edison Company is a wholly-owned subsidiary of Allegheny Power System, Inc. Potomac Edison Company has two subsidiaries that are not wholly owned by it: Allegheny Generating Company and Allegheny Pittsburgh Coal Company.

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* Hester Industries, Inc. was a defendant in the trial court and an appellee in the West Virginia Supreme Court of Appeals. Petitioner believes that Hester Industries, Inc. has no interest in the outcome of this Petition, and a notice to that effect is being filed and served with this Petition as required by Supreme Court Rule 12.4.

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Petitioner Potomac Edison Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia, entered in this matter on June 27, 1991.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is not yet reported, but is reprinted in Appendix A, at 1a-19a. The Jury Order of the Circuit Court for Hardy County, West Virginia, incorporating the jury's verdict, was entered on July 26, 1989, and is

reprinted in Appendix B, at 20a-23a. The judgment against petitioner was amended to include prejudgment interest in an Order entered on August 16, 1989, reprinted in Appendix C, at 24a-25a. The Circuit Court denied petitioner's motions for a new trial and to amend or set aside the judgment in an Order entered on October 6, 1989, reprinted in Appendix D, at 26a-27a. The Circuit Court denied additional post-trial motions in an Order entered on May 15, 1990, reprinted in Appendix E, at 28a-29a.

JURISDICTION

The Judgment of the Supreme Court of Appeals of West Virginia was entered on June 27, 1991. This Petition is filed within ninety days of the entry of that Judgment, and is timely pursuant to Supreme Court Rule 13.4.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" The Equal Protection Clause of the Fourteenth Amendment provides in pertinent part: "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

The provision of the West Virginia Workers Compensation Act, which has been read to immunize contributing employers from liability, not only to their injured employees, but also to claims for contribution filed by third parties who are sued by those employees, is West Virginia Code § 23-2-6. That provision is reprinted verbatim in Appendix F, at 30a.

STATEMENT OF THE CASE

Petitioner Potomac Edison Company is an electric utility that provides service in western Maryland and certain portions of Virginia and West Virginia. One of its industrial customers is Hester Industries, Inc., which operates a food processing plant in Moorefield, West Virginia. In 1984 Hester retained the services of a contractor, respondent Carl Belt, Inc., to perform construction work at its Moorefield plant. Respondent Joe D. Helmick was a laborer employed by Carl Belt at the Hester construction site.

In August 1986, Carl Belt commenced excavation operations utilizing heavy equipment in the vicinity of an electric utility pole that had been erected by petitioner at the Hester site earlier that year. The power line supported by that pole carried 19.5 kilovolts of electricity. The utility pole was stabilized by a grounded supporting guy wire.

Carl Belt's supervisors on the construction site determined that it would be more efficient for their operations to remove the supporting guy wire from the pole in order to facilitate the movement of a backhoe around the pole. At trial, Carl Belt's construction foreman testified that he asked Potomac Edison personnel to remove the guy wire but that petitioner's employees refused because removal of the wire would relax tension on the pole. Petitioner's employees testified that they had no record or recollection of Carl Belt's request, but agreed that the removal of this guy wire would create an unsafe condition, including the potential for the pole to collapse exposing workers on the site to downed high voltage lines. Carl Belt's employees testified that they did not appreciate this danger, nor the danger that the guy wire itself might become electrified if it came into contact with the energized equipment at the top of the utility pole.

Carl Belt's construction supervisors decided themselves to remove the guy wire from its anchor in the ground and

to attach to the wire a device known as a "come-along." The come-along provided extra slack in the wire and could be loosened or tightened as circumstances required. While the backhoe was operating in the vicinity of the pole Carl Belt's employees would loosen the come-along so that the guy wire could be removed out of the path of the equipment. On several occasions prior to October 24, 1986, Carl Belt's employees moved the guy wire in this fashion without incident.[1]

On October 24, 1986, while respondent Helmick was assisting in the movement of the guy wire, an uninsulated portion of the slackened wire came into contact with an energized lightning arrester at the top of the utility pole. The guy wire became electrified, and Mr. Helmick, who was handling the wire, suffered severe burns to his left forearm and the soles of his feet. Ultimately, Mr. Helmick's left arm had to be amputated at his elbow. *See* App. A, at 5a-6a.

In 1987, respondent Helmick filed a claim for workers' compensation benefits. On September 8, 1988, Mr. Helmick received a workers' compensation award of $53,760.00, predicated on a 60 percent permanent partial disability finding. App. A, at 6a-7a.

In 1988, while the workers' compensation proceedings were pending, respondents Joe D. and Tammy Helmick filed a civil action against both petitioner and respondent Carl Belt, Inc. in the Circuit Court for Hardy County, West Virginia. After the defendants removed the case to the United States District Court for the Northern District of West Virginia, predicated upon diversity jurisdiction, plaintiff filed an amended complaint in the

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[1] Carl Belt's employees testified that their use of the "come-along" to move the guy wire had been witnessed by unidentified Potomac Edison personnel. Petitioner's witnesses testified that Carl Belt's actions in moving the wire were not known to any of its construction or maintenance personnel, and were completely unanticipated. *See* App. A, at 6a.

state court, naming Hester Industries as an additional defendant. That amendment destroyed complete diversity, and the case remained in the Circuit Court. App. A, at 5a.

The Helmicks' claims against petitioner were premised on an allegation that the utility pole had been negligently designed and constructed in a manner that permitted the guy wire to come into contact with energized portions of the pole.[2] Under West Virginia's Workers Compensation Act, W. Va. Code § 23-2-6, injured employees generally are precluded from filing damage actions against their employers. The Helmicks' claims against Carl Belt were predicated on an exception to that principle of employer immunity first recognized by the West Virginia Supreme Court of Appeals in *Mandolidis* v. *Elkins Industries, Inc.*, —— W.Va. ——, 246 S.E.2d 907 (1978). A successful *Mandolidis* claim requires the injured employee to prove that his employer deliberately exposed him to a known hazard. *See* App. A, at 7a, n.3.

Petitioner filed cross-claims against both its co-defendants. It asserted a third-party *Mandolidis* claim for contribution or indemnity against respondent Carl Belt, and a contractual claim for indemnity against Hester Industries. On the eve of trial the Helmicks dismissed their *Mandolidis* claim against respondent Carl Belt; during the trial they dismissed their negligence claims against Hester. At the close of petitioner's case-in-chief on its cross-claims, the Circuit Court directed a verdict against petitioner on its *Mandolidis* claim against Carl Belt and directed a verdict against petitioner on one aspect of its contractual claim for indemnity against Hester. *See* App. A, at 7a.

The jury was given a special verdict form which directed it to assess the comparative negligence of petitioner, Carl Belt, and Mr. Helmick himself, and then to allocate the percentage of fault of each of these three

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[2] The complaint included a claim by Tammy Helmick for loss of consortium.

parties for Mr. Helmick's injuries. The jury also was asked to determine the total damages suffered by the Helmicks, and to determine whether Hester was liable to petitioner for breach of an agreement of indemnity. The jury found that respondent Joe D. Helmick had not been guilty of contributory negligence, but that both petitioner and Carl Belt had been negligent. The jury apportioned the total negligence between petitioner and Carl Belt at 40% and 60%, respectively. The jury found that the Helmicks' total damages amounted to $498,232.84, with $25,000.00 of that total assigned to Mrs. Helmick's loss of consortium claim. Finally, the jury determined that Hester was not liable to petitioner on its cross-claim for indemnity. *See* App. B, at 21a-22a.

Notwithstanding the jury's allocation of fault between petitioner and respondent Carl Belt, the Circuit Court applied West Virginia's precedents adopting the principles of joint and several liability and workers' compensation immunity for employers from third-party claims for contribution, and ordered that petitioner would be responsible for the full amount of the Helmicks' damages, including prejudgment interest that brought the total verdict to $515,621.86. App. C, at 25a.

Petitioner filed several post-trial motions, seeking *inter alia*: a modification of the judgment to reduce petitioner's liability to the Helmicks by 60%, proportionate to its percentage of fault as determined by the jury; a set-off of the Helmicks' verdict in the amount that already had been awarded to respondent Joe D. Helmick in workers' compensation benefits; and the entry of judgment in its favor, or a new trial, on its cross-claim for contribution against respondent Carl Belt. All these post-trial motions were denied in an Order dated October 6, 1989. App. D, at 26a.[3]

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[3] A subsequent motion based on asserted new evidence concerning the failure of several members of the jury panel to reveal certain facts during *voir dire* was denied on May 15, 1990. App. E, at 28a-29a.

On September 18, 1990, the West Virginia Supreme Court of Appeals granted petitioner's Petition for Appeal. In an opinion dated June 27, 1991, the Supreme Court of Appeals affirmed the Circuit Court's judgment.

With respect to the question presented herein, petitioner urged the West Virginia Supreme Court of Appeals to hold that the trial court had erred in directing a verdict in favor of respondent Carl Belt on its third-party claim for contribution. The Supreme Court of Appeals ruled that the evidence presented by petitioner at trial failed to meet the requirements of the "deliberate intention" exception to the principle of employer immunity that were first set forth in *Mandolidis* and later codified in W. Va. Code § 23-4-2(c)(2) (1983). The Court held that the *Mandolidis* exception was meant "to deter the malicious employer, not to punish the stupid one." App. A, at 10a-11a. While "Carl Belt was indeed negligent in allowing the events that led up to this accident to occur, . . . it was not malicious." *Id.* at 11a.

Alternatively, petitioner argued that the deprivation of its right to seek contribution or indemnity from a negligent employer protected by the West Virginia Workers Compensation Act violated the Fourteenth Amendment's Due Process Clause, as well as provisions of the West Virginia Constitution. The Supreme Court of Appeals rejected this argument based on its recent ruling in *Miller* v. *Monongahela Power Co.*, —— W. Va. ——, 403 S.E.2d 406 (1991), *cert. pending*, No. 91-146 (July 22, 1991).[4] In *Miller*, the Court had held that:

> The combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's rules on joint and several liability; and (3) West Virginia's statutory workers' compensation immunity

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[4] The question presented in this Petition is essentially identical to the first question presented in *Monongahela Power* v. *Miller*, No. 91-146 (filed July 22, 1991).

does not violate federal due process and equal protection principles.

403 S.E.2d at 408, quoted in App. A, at 12a.

As it had done in *Miller*, the Supreme Court of Appeals recognized the compelling logic of petitioner's contention that it made no sense in a system of comparative negligence for a third-party tortfeasor to be saddled with more than its proportionate share of the damages awarded to an injured employee, while the employer, who was quilty of greater negligence, is held immune from liability. But the Supreme Court of Appeals apparently believed, erroneously, that the acceptance of petitioner's "logical point of view" would require the Court "to overturn over one hundred years of American tort law." App. A, at 12a.[5]

Finally, the Supreme Court of Appeals rejected petitioner's suggestion that it could soften somewhat the glaring inequities of the *Miller* ruling by adopting a rule that an injured employee's recovery against a third-party tortfeasor should at least be offset by the lesser of his workers' compensation benefits or the percentage of his tort recovery found by the jury to be attributable to the negligence of the immunized employer. The Court found no West Virginia precedent supporting that "equitable solution," and declined to adopt it. App. A, at 12a.[6] The judgment against petitioner and in favor of the Helmick respondents was affirmed, as was the judgment

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[5] As demonstrated below, very few states have adopted the bizarre combination of tort and workers' compensation principles espoused by the West Virginia Supreme Court of Appeals. Indeed, as petitioner had demonstrated in its brief in the Supreme Court of Appeals, the courts of several states have struck down the resulting systems of tort liability as violative of federal due process and equal protection principles. *See* pages 13 to 19 *infra*.

[6] The Supreme Court of Appeals also rejected several other contentions raised by petitioner, none of which is pertinent to the federal constitutional question presented herein.

against petitioner and in favor of respondent Carl Belt on petitioner's cross-claim for contribution.[7]

REASONS FOR GRANTING THE WRIT

I. WEST VIRGINIA'S SYSTEM OF TORT LIABILITY FOR COMPENSATING INJURED WORKERS VIOLATES FEDERAL DUE PROCESS AND EQUAL PROTECTION PRINCIPLES

The consequences of the rulings of the West Virginia Supreme Court of Appeals in this case and in *Miller* are as follows: Under its prior decision in *Bowman* v. *Barnes*, 168 W. Va. 111, 282 S.E.2d 613 (1981), a trial court is to present to the jury a special verdict form requiring the jury to assess the comparative fault of a third-party defendant and an employer for an injured worker's accident, in spite of the employer's workers' compensation immunity from liability. In this case, the jury found the employer's negligence to be 60% responsible for the accident. But absent proof of a deliberate intention by the employer to expose its employee to injury, that jury finding of employer negligence is meaningless. Under principles of joint and several liability, the third-party defendant is held responsible for the full amount of the verdict—it cannot seek contribution from the more negligent employer, nor is the injured worker's verdict reduced proportionate to the third-party defendant's comparative fault.

The West Virginia Supreme Court of Appeals now has ruled twice in recent months that this system of tort liability does not violate a third-party defendant's rights to due process and equal protection, without ever meeting the objection that the system is arbitrary and irrational, and without ever articulating any state policy objectives

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[7] By order dated July 17, 1991, the Supreme Court of Appeals stayed the effect of its opinion affirming the judgment until October 28, 1991, in order to permit a decision by this Court on a Petition for Writ of Certiorari.

that the system is designed to serve. In fact, this combination of workers' compensation immunity principles and tort doctrine advances no legitimate policy objectives; it merely serves instead to shift unfairly the responsibility for industrial accidents from culpable employers to less culpable third parties.

The leading commentator in the field has described the issue whether or not third-party tortfeasors should be afforded some sort of contribution remedy against a negligent employer as "[p]erhaps the most evenly-balanced controversy in all of workers' compensation law." Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 Duke L.J. 483, 484, *quoted in Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 193 n.3 (1983); *ibid.*, 460 U.S. at 199 (Rehnquist, J., dissenting). West Virginia, through the decisions of its Supreme Court of Appeals, has resolved that issue in the most unbalanced fashion imaginable. In so doing, the West Virginia Court has transgressed "the constitutional minimum of 'fundamental fairness,'" by which this Court may judge state court standards for the determination of one party's liability for another's injuries. *See, e.g., Santosky* v. *Kramer*, 455 U.S. 745, 756 n.8 (1982).[8] Moreover, the decision of the West Virginia Supreme Court of Appeals in this case is in direct conflict with decisions of several other state courts of last resort which have held similar aspects of their own systems of tort liability to violate federal constitutional

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[8] In *Martinez* v. *California*, 444 U.S. 277, 282 (1980), this Court afforded broad deference to the states' interests in fashioning their own rules of tort law, but recognized that that interest may not be paramount to the federal constitutional interest "in protecting the individual citizen from state action that is wholly arbitrary or irrational." *See also Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982); *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 781 (E.D.N.Y. 1984) ("the law believes it unfair to require an individual to pay for another's tragedy unless it is shown it is more likely than not that he caused it").

guarantees of due process and equal protection. *See* pages 13 to 16 *infra.*

As frankly conceded in the opinion below, the West Virginia Supreme Court of Appeals has adopted a system of comparative negligence, but has retained the doctrine of joint and several liability. App. A, at 12a. Thus, in a case in which an injured employee sues a third party for his injuries, he is entitled to recover all of his damages from that third party, even if a jury has determined that the employer is more responsible for the accident than the third party, and even if the plaintiff-employee is more responsible for the accident than the third party, so long as the combined negligence of the employer and the third-party defendant exceeds that of the plaintiff-employee. *See Miller* v. *Monongahela Power Co., supra,* 403 S.E.2d at 414.

In this case petitioner must pay 100% of the Helmicks' verdict even though the jury determined that its negligence was only 40% responsible for the accident. In *Miller*, the West Virginia Court ruled that even a 1% negligent third party would have to pay all the damages awarded to an injured employee, even if the jury determined that the employee was 10% negligent and his employer was responsible for the remaining 89% of the total fault. 403 S.E.2d at 414.

What the Court below also made explicit in its opinion is that, under West Virginia law, the third-party defendant in the tort action is absolutely precluded from suing the negligent employer for contribution, even though the employer's negligence, rather than that of the third party, was primarily responsible for the plaintiff's injuries. The West Virginia Supreme Court of Appeals consistently has read the statutory immunity afforded to employers under the Workers Compensation Act, W. Va. Code § 23-2-6, as precluding actions for contribution by third parties, even though that result was not ordained expressly by the legislature. *See Sydenstricker* v. *Uni-*

punch Products, Inc., 169 W. Va. 440, 288 S.E.2d 511, 516-17 (1982). *See also Miller* v. *Gibson*, ——, W. Va. ——, 355 S.E.2d 28, 31-32 (1987).[9] The only exception to this judicial gloss on the immunity afforded the workers' compensation employer by the legislature is where the employer may be deemed to have intentionally placed his employee in danger. The facts and rulings in this case demonstrate the narrow scope of this so-called *Mandolidis* exception. *See* page 7, *supra*.

Were it not for this judicial interpretation of W. Va. Code § 23-2-6, affording workers' compensation immunity to employers from third-party claims for contribution, petitioner would have prevailed on its claim for contribution against respondent Carl Belt, and would have been able to reduce its own liability to the Helmick respondents by 60%, a sum in excess of $300,000.00. The common-law right of one joint tortfeasor to seek contribution from another has been recognized in West Virginia since the formation of the State. *See Haynes* v. *City of Nitro*, 161 W. Va. 230, 240 S.E.2d 544, 548-49 (1977). That common-law right of contribution has been codified by the legislature in W. Va. Code § 55-7-13, first enacted in 1872. The West Virginia legislature, according to the recent decisions of the Supreme Court of Appeals, abrogated the common-law and statutory right of contribution when it enacted the Workers Compensation Act in 1913. The arbitrary and irrational result is that a slightly negligent third party may be held liable for the totality of an injured employee's damages, while the plaintiff's negligent employer—even if primarily responsible for the accident—remains free from tort liability.

In a final irony of the West Virginia system of tort liability, up until recently it was one of only three states

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[9] W. Va. Code § 23-2-6, reprinted in App. F, simply states that an employer who is in good standing under the Workers Compensation Act "shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring . . . ."

that neither provided for a plaintiff's damages to be reduced by the amount of workers' compensation benefits he receives, *see Jones* v. *Appalachian Electric Power Co.*, 145 W. Va. 478, 115 S.E.2d 129 (1960), nor for the employer to be entitled to subrogation rights with respect to the judgment awarded or settlement obtained in the third party action, *see Jones* v. *Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973). *See generally National Fruit Product Co.* v. *Baltimore & Ohio R.R.*, —— W. Va. ——, 329 S.E.2d 125, 127-29 (1985). Thus, the injured worker was entitled to a duplicative recovery of workers' compensation benefits plus any damages awarded by a jury or obtained in a settlement with an alleged third-party tortfeasor. *National Fruit Product, supra*, 329 S.E.2d at 129, n.2.[10]

In this case, the West Virginia Supreme Court of Appeals squarely rejected petitioner's federal constitutional argument that its system of comparative negligence, coupled with joint and several liability, and employer immunity from claims for contribution, violates Fourteenth Amendment due process principles. Other state courts of last resort, faced with similar or identical systems of allocating tort liability, have reached the opposite result.

For example, in *Carlson* v. *Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974), the Supreme Court of Minnesota was confronted with a provision of that state's workers' compensation law that expressly stated that "the employer shall have no liability to reimburse or hold [a

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[10] In legislation that became effective on July 1, 1990, and that applies only to claims arising from injuries after that date, the West Virginia legislature adopted a limited form of subrogation, enabling the employer to recover medical benefits paid under workers' compensation from the proceeds obtained by the employee in the third-party action. The amount to be received by the employer in subrogation, however, may not exceed 50% of the employee's recovery from the third party, net of any attorney's fees and costs. *See* W. Va. Code § 23-2A-1.

third-party tortfeasor] harmless on such judgments or settlements [obtained by his employee] in absence of a written agreement to do so executed prior to the injury." 215 N.W.2d at 617. The third-party tortfeasor in that case challenged the validity of the provision on federal due process grounds. The Court determined that a legislative decision to extinguish a common law right of contribution or indemnity would survive due process scrutiny if the legislature provided some reasonable substitute for the third party's rights and the legislation was rationally related to a legitimate state objective. 215 N.W.2d at 618. The *Carlson* Court held that the Minnesota legislation failed both tests.

The Court in *Carlson* observed that a third-party tortfeasor gains nothing from the more efficient remedial system created by the workers' compensation statute, and the legislature had provided no reasonable substitute for the abrogation of the third-party's common law right of contribution. Moreover, "[n]o legitimate objective is fostered by preventing indemnification to a third-party tortfeasor from a negligent employer." *Id.* at 619. The Court therefore held that the Minnesota statute affording workers' compensation immunity to employers from third-party contribution claims "violates the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution . . .," as well as similar provisions of the Minnesota Constitution. *Id.* at 620.[11]

The Florida Supreme Court reached the same result as the Minnesota Court in *Carlson*, relying on the Equal Protection Clause of the Fourteenth Amendment. *See Sunspan Engineering & Construction Co.* v. *Spring-Lock*

[11] The result reached in *Carlson* was reaffirmed by the Minnesota Supreme Court in *Lambertson* v. *Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679, 687 (1977). In *Lambertson*, the Court decided that under Minnesota's comparative negligence regime the third-party tortfeasor is entitled to contribution from a negligent employer "in an amount proportional to [the employer's] percentage

Scaffolding Co., 310 So. 2d 4 (Fla. 1975). In *Sunspan*, the Florida Supreme Court noted that under that state's workers' compensation law both the injured employee and his employer are given the right to sue an alleged third-party tortfeasor, "but unequally and unreciprocally the tort-feasor is precluded from suing in turn in a third party action the employer who may be primarily liable instead of the tort-feasor for the employee's industrial accident." 310 So. 2d at 7. This statutory result causes the third party to "suffer[] the burdens and restrictions of the [Workers Compensation] Act, while the employer receives a windfall . . . ." *Id.*

The Court concluded that the Florida legislature, in eliminating the third party's right of contribution, had created "an arbitrary and capricious innovation without any rational basis furthering any overpowering public necessity," and was therefore contrary to the Florida Constitution. Moreover, the fact that the Act singled out only those alleged tortfeasors who had provided goods or services to employers involved in accidents covered by workers' compensation, was deemed an arbitrary classification in violation of the Fourteenth Amendment's Equal Protection Clause. *Id.* at 8. The Florida Supreme Court recently reaffirmed *Sunspan*, over the dissent of one Justice, in *L.M. Duncan & Sons* v. *City of Clearwater*, 478 So. 2d 816 (Fla. 1985).[12]

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of negligence, but not to exceed [the employer's] total workers' compensation liability to plaintiff." 257 N.W.2d at 689.

[12] In a comparable decision that relied only on state constitutional grounds, the Kentucky Court of Appeals has held that the "exclusive remedy" provision of that state's workers' compensation statute does not insulate an employer from tort liability asserted by way of an action for indemnity by a "passively-negligent" third-party tortfeasor. *Kentucky Utilities Co.* v. *Jackson County Rural Elec. Coop. Corp.*, 438 S.W.2d 788 (Ky. 1969). The Kentucky Court ruled that any contrary reading of the statute would violate that provision of the Kentucky Constitution which forbids the General Assembly from abolishing pre-existing common law "jural rights."

In Ohio, the state's intermediate Court of Appeals adopted a different route to reach essentially the same result. In *Couch* v. *Thomas*, 26 Ohio App. 3d 55, 497 N.E.2d 1372 (1985), the Court determined that a co-employee of an injured worker was protected by workers' compensation immunity from a claim for contribution by a third-party tortfeasor. But the Court reasoned that under the State's system of comparative negligence, the third party should be entitled to a jury determination of the co-workers' percentage of fault, and should be held liable only for his own proportionate share of the total negligence contributing to the injured employee's damages. In reaching this result, the Court observed that "[t]he fact that [the third party otherwise] is obligated to pay more than his proportionate share of liability [to the plaintiff] also violates his right to due process of law and his right to equal protection under the law. It also offends our basic sense of equity and fair play." 497 N.E.2d at 1375. As this case demonstrates, in West Virginia the third party may be entitled to a jury determination of the employer's percentage of comparative fault, but that finding is meaningless—the third party still must pay all the injured worker's damages.

To be sure, other state and federal courts have rejected constitutional arguments akin to those presented by this Petition.[13] However, there is substantial conflict in the law over the application of federal due process and equal protection principles to this area of a third-party tortfeasor's rights and remedies against a negligent employer. In addition, many state courts that operate under a system of comparative negligence have abrogated

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[13] *See, e.g., Hudson* v. *Union Carbide Corp.*, 620 F. Supp. 558, 564-65 & n.8 (N.D. Ga. 1985) (expressly noting the conflict with *Carlson* and *Sunspan*); *Williams* v. *White Mountain Construction Co.*, 749 P.2d 423 (Colo. 1988); *Raisler* v. *Burlington Northern R.R. Co.*, 219 Mont. 254, 717 P.2d 535 (1985); *Tsarnas* v. *Jones & Laughlin Steel Corp.*, 418 Pa. 513, 412 A.2d 1094 (1980); *Mulder v. Acme-Cleveland Corp.*, 95 Wis.2d 173, 290 N.W.2d 276 (1980).

or modified the doctrine of joint and several liability so that a less negligent third party, such as petitioner in this case, is not unfairly saddled with liability for the proportionate fault of the more negligent employer who is immunized by a workers' compensation act.[14]

In fact, at least some of the decisions that have rejected federal constitutional challenges to workers' compensation immunity from third-party claims for contribution have done so in express reliance upon the ground that the third party would *not* be subjected to joint and several liability for the employer's proportionate share of the damages. *See, e.g., Williams* v. *White Mountain Construction Co.*, 749 P.2d 423, 428-29 (Colo. 1988) (noting that the third-party tortfeasor is not required to shoulder a disproportionate share of liability because under the Colorado system of comparative negligence, and the legislative abolition of joint and several liability, tortfeasors sued by injured employees are able to present evidence of employer liability at trial and to "reduce whatever damages may be assessed against them to a level proportionate to their [own] liability"); *cf., In re Air Crash Disaster at Stapleton*, 720 F. Supp. 1465, 1466-67 (D. Colo. 1989) (applying similar analysis to constitutional challenge to governmental immunity from third-party contribution claims).

Moreover, in many other comparative negligence states, such as Ohio, discussed *supra*, the legislatures or the courts have required that the immune employer's percentage of negligence be determined by the jury, and the third party's liability to the plaintiff reduced to reflect

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[14] Of the forty-five states that have adopted some form of comparative negligence, either by legislation or judicial decision, eight have abolished the doctrine of joint and several liability. *See* V. Schwartz, *Comparative Negligence* § 16.4 (2d ed. 1986 & 1990 Supp.). At least fourteen other states have limited their application of joint and several liability principles so that the doctrine does not apply to most forms of negligence actions or to non-economic damages. *See* V. Schwartz, *supra*, at pp. 50-51 (1990 Supp.).

only its proportionate share of the total fault, or reduced to reflect the benefits received by the plaintiff from the workers' compensation employer. *See, e.g., Associated Construction & Engineering Co.* v. *Workers' Compensation Appeals Bd.*, 22 Cal.3d 829, 150 Cal. Rptr. 888, 587 P.2d 684 (1978); *Runcorn* v. *Shearer Lumber Products, Inc.*, 107 Idaho 389, 690 P.2d 324, 330-31 (1984); *Scales* v. *St. Louis- San Francisco Ry.*, 2 Kan. App. 2d 491, 582 P.2d 300 (1978); *Bartlett* v. *New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (1982); *Leonard* v. *Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E.2d 528 (1983); *Bode* v. *Clark Equipment Co.*, 719 P.2d 824 (Okla. 1986); Ariz. Rev. Stat. Ann. § 12-2506(B) (1987); Wash. Rev. Code Ann. § 4.22.070(1) (1986).

Finally, in at least two states, the courts of last resort have held that the immunity afforded to the employer by the workers' compensation statute was not intended by the state legislatures to eliminate a third party's claim for indemnity or contribution. *See Skinner* v. *Reed-Prentice Division*, 70 Ill.2d 1, 374 N.E.2d 437, *cert. denied*, 436 U.S. 946 (1978); *Dole* v. *Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 383, 282 N.E.2d 288 (1972).

The opinion of the West Virginia Supreme Court of Appeals in this case erroneously suggested that the acceptance of petitioner's constitutional arguments would require that Court "to overturn over one hundred years of American tort law." App. A, at 12a. In fact, nearly half of the states' legislatures and courts now have recognized that the retention of the doctrine of joint and several liability is itself fundamentally incompatible with a system of comparative negligence. *See* V. Schwartz, *Comparative Negligence* § 16.4 (2d ed. 1986 & 1990 Supp.). In addition, many other states have recognized that to immunize negligent employers from claims for contribution by alleged third-party tortfeasors unfairly shifts the burden of industrial accidents from those employers to the third parties. Finally, many state

courts operating under a comparative negligence system reduce the third party's liability to the employee-plaintiff proportionate to the third party's own percentage of fault, or at least reduce the plaintiff's award of damages commensurate with his receipt of workers' compensation benefits.

The solutions presented by petitioner, and rejected by the West Virginia Supreme Court of Appeals, need not impinge at all on the employer's statutory immunity from costs in excess of those imposed by the workers' compensation system. Moreover, the adoption of those solutions would still preserve the employee's ability to sue third parties for damages in excess of his workers' compensation benefits. Other states that have acted consonant with these legitimate legislative objectives have adopted these solutions. By doing so they have prevented the fundamental unfairness of saddling a slightly negligent third party, such as petitioner, with all the damages awarded to an injured employee (who himself may have been more responsible for his injuries), while immunizing his negligent employer from any liability.

The failure of the West Virginia legislature and Supreme Court of Appeals to adopt any of these solutions yields the inequitable results presented by this case. The West Virginia Court's admixture of workers' compensation and tort principles is wholly arbitrary and irrational.[15] And it is clear that unless this Court grants

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[15] Professor Paul C. Weiler recently surveyed the possible "alternative relations" of third-party tort liability and workers' compensation immunity for employers, noting the widespread nature of this problem in the modern economy. Weiler, *Workers' Compensation And Product Liability: The Interaction Of A Tort And A Non-Tort Regime*, 50 Ohio St. L.J. 825 (1989). Although Professor Weiler's analysis is grounded more in economic policy than constitutional jurisprudence, his conclusion is telling: "The standard response in most of the states, which effectively insulate even the egregiously culpable employer from any responsibility through a combination of employer subrogation for [workers' compensation]

plenary review of the decisions in this case and in *Miller*, the West Virginia Supreme Court of Appeals will continue on its present course, failing to recognize the "paramount" "federal constitutional interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez* v. *California*, 444 U.S. 277, 282 (1980).

When this Court first upheld the constitutionality of workers' compensation legislation, it did so with a caveat: "Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, *without providing a reasonably just substitute.*" *New York Central R.R.* v. *White*, 243 U.S. 188, 201 (1917) (emphasis added). As recently as its decision in *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), this Court reexamined the essential compromise of workers' compensation legislation, whereby "employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue [their employer]." 460 U.S. at 194.[16] What the West Virginia Supreme Court of Appeals has failed to acknowledge in this case is that petitioner, as a third-party tortfeasor, is a stranger to that legislative "*quid pro quo.*" In the

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benefits and immunity from any contribution to the third party's tort liability, makes little sense." *Id.* at 854.

[16] In *Lockheed*, this Court held that the exclusive remedy provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c), does not bar a third party's indemnity action against the governmental employer, in the absence of evidence that Congress had intended to disturb settled doctrines of tort law affecting categories of parties who did not themselves benefit from the legislative *quid pro quo*. *See* 460 U.S. at 196-98. *See also Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 601 (1963) (reaching the same result under the Longshoremen's and Harbor Workers' Compensation Act).

words of Professor Larson, it is unfair for the workers' compensation scheme "to pull the third party within the principle of mutual sacrifice when his part is to be all sacrifice and no corresponding gain." Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 Nw. U.L. Rev. 351, 420 (1970).

As demonstrated herein, there are multiple solutions to the overwhelming unfairness of the system devised by the West Virginia legislature and implemented by the Supreme Court of Appeals. The Court or legislature could recognize the continuing vitality of a third party's right to claim contribution from a negligent employer such as respondent Carl Belt, which the highest courts of Florida and Minnesota have required as a federal constitutional minimum. Or the Court or legislature could require that a third party be held responsible only for its proportionate share of the fault, which the Ohio courts have held to be required by due process and equal protection principles. Or the Court or legislature could recognize the basic incongruity between the principles of comparative negligence and joint and several liability, as many state courts and legislatures have done. In the absence of any of these remedies, however, the tort system of West Virginia, as presently constituted and as applied in this case, violates principles of "fundamental fairness."

Because state courts of last resort have decided the federal constitutional questions presented by this Petition in ways that conflict with the decisions of the West Virginia Supreme Court of Appeals, and because of the importance of the issues raised by the application of federal due process and equal protection principles to the states' methods of affording workers' compensation immunity to third-party claims for contribution, the decision below warrants plenary review by this Court. Petitioner should be entitled, as the constitutional minimum guaranteed by the Due Process Clause, to have the jury's determination

that Mr. Helmick's accident was 60% attributable to the fault of Carl Belt count for something in any calculation of damages owed to the Helmicks by petitioner. Under the consistent rulings of the West Virginia Supreme Court of Appeals, however, that jury finding was totally meaningless. The system of tort liability imposed by that Court on those who are unfortunate enough to be sued for on-the-job injuries suffered by workers who are also the beneficiaries of the state's workers' compensation legislation can only be described as bizarre. In constitutional terms, the system is wholly arbitrary and irrational, and fails to serve any legitimate state policy objective.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

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APPENDIX A

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1991 Term

No. 19772

JOE D. HELMICK and TAMMY HELMICK,
Plaintiffs Below, Appellees

v.

POTOMAC EDISON COMPANY, A MARYLAND CORPORATION,
Defendant Below,

CARL BELT, INC., A MARYLAND CORPORATION,
HESTER INDUSTRIES, A CORPORATION,
Defendants Below, Appellees,

POTOMAC EDISON COMPANY, A MARYLAND CORPORATION,
Defendant Below, Appellant

Appeal from the Circuit Court of Hardy County
Honorable John M. Hamilton, Judge
Civil Action No. 88-C-118

AFFIRMED

Submitted: May 14, 1991

Filed: June 27, 1991

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JUSTICE NEELY delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "A company maintaining an electric line, over which a current of high and dangerous voltage passes, in a place to which it knows or should anticipate others lawfully may resort for any reason, such as business, pleasure or curiosity, and in such manner as exposes them to danger of contact with it by accident or inadvertence, is bound to take precautions for their safety by insulation of the wire or other adequate means." Syllabus Point 2, *Love v. Virginian Power Co.*, 86 W.Va. 393, 103 S.E. 352 (1920).

2. To establish "deliberate intention" in an action under *W. Va. Code*, § 23-4-2(c)(ii) (1983), a plaintiff or cross-claimant must offer evidence to prove each of the five specific statutory requirements.

3. "The combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's rules on joint and several liability; and, (3) West Virginia's statutory workers' compensation immunity does not violate federal due process and equal protection principles." Syllabus Point 5, *Miller v. Monongahela Power Co.*, W.Va. ——, 403 S.E.2d 406 (1991).

4. Contracts of adhesion by which monopolies require indemnification for incidents in which the monopoly is at fault are void as against public policy.

5. "Under *W. Va. R. Civ. P.* 26(b)(4)(i), 'a party is required to disclose to another party the identity of persons whom that party intends to call as expert witnesses at trial only when that party has determined *within a reasonable time before trial* who his expert witnesses will be.'" Syllabus Point 3, *Michael v. Henry*, —— W.Va. ——, 354 S.Ed2d 590 (1987) (emphasis added).

6. The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.

7. "A trial court is afforded wide discretion in determining the admissibility of photographic evidence." Syllabus Point 6, *Miller v. Monongahela Power Co.*, —— W.Va. ——, 403 S.E.2d 406 (1991).

8. "Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption." Syllabus Point 5, *Roberts v. Stevens Clinic Hosp.*, —— W.Va. ——, 345 S.E.2d 791 (1986).

9. As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement except when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

Neely, J.:

Joe D. Helmick and Tammy Helmick brought an action against Potomac Edison Company in the Circuit Court of Hardy County for injuries that Mr. Helmick received in moving a guy wire attached to a Potomac Edison utility pole. After removal to the United States District Court for the Northern District of West Virginia, the Helmicks added Hester Industries, Inc., on whose property the injury had occurred, as a defendant, destroying diversity jurisdiction, and the case was returned to the Circuit Court of Hardy County. Potomac Edison cross-claimed against Carl Belt, Inc., Mr. Helmick's employer, for its negligence. Potomac Edison now appeals the verdict against it for $515,621.86 and the trial court's dismissal of its claims against Hester and Carl Belt. We affirm.

On 24 October 1986, Joe D. Helmick, burned his left forearm and the soles of both of his feet when he attempted to move a guy wire connected to a utility pole that was supporting power lines operated by Potomac Edison. Ultimately, Mr. Helmick's left arm had to be amputated at the elbow. Skin grafts to his feet have allowed Mr. Helmick to walk again. Although Mr. Helmick returned to work with Carl Belt, he is no longer able to do the heavy manual labor for which he was originally hired.

At the time of the accident, Carl Belt was an independent contractor employed by Hester Industries, Inc. to do construction at Hester's Moorefield plant in Hardy County. During construction, the guy wire attached to the utility pole had to be moved several times to allow construction. Carl Belt asked Potomac Edison to send someone to remove the guy wire temporarily; Potomac Edison refused for the alleged reason that to do so would relax tension on the pole. The jury, however, could have reasonably inferred that the true reason for defendant's uncooperative response was an unwillingness to under-

take additional work. Following Potomac Edison's refusal, Carl Belt's employees successfully moved the wire on several occasions.

When the accident happened, Mr. Helmick (along with Allan Street and Dale White, two other employees of Carl Belt) was trying to move the guy wire by means of a come-along [1] that was attached to it. Carl Belt's employees had attached the come-along to the guy wire approximately one to two months before the accident for use in moving the wire. The come-along was left attached for this one to two month period in full view, and, in fact, Potomac Edison's employees had seen Carl Belt's employees use the come-along to move the guy wire.

The utility pole was erected pursuant to a 1982 agreement between Potomac Edison and Hester for Potomac Edison to provide electricity to Hester.[2] Potomac Edison points out that it moved the pole onto Hester's property without an explicit new grant of right-of-way for the pole, but there was also no explicit agreement between Potomac and Hester that ownership of the pole would be transferred. When Potomac moved the pole they did not remove their ownership tag from the pole, but instead left it there indicating Potomac Edison's continued ownership of the pole.

Before trial, Mr. Helmick received an award of $53,760 from West Virginia Workers' Compensation. Shortly be-

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[1] A come-along is a mechanical device used to grip two objects and pull them together. It consists of two jaws attached to a ring so that the jaws are closed by pulling on the ring. *Webster's Third New International Dictionary*, 265 (G. &C. Merriam Co. 1970).

[2] The agreement was a standard form contract supplied by Potomac Edison with two additional typewritten paragraphs. The two paragraphs at issue in the court below were Paragraph 7, Potomac Edison's standard indemnification agreement and, Paragraph 15, one of the typewritten paragraphs pertaining to Hester's duty to protect certain property (specifically a transformer) leased from Potomac Edison.

fore trial, the plaintiffs dismissed their *Mandolidis*[3] claims against Carl Belt, although Potomac Edison continued to pursue its *Mandolidis* cross-claim against Carl Belt.

After the close of Potomac Edison's case in chief, the trial court directed a verdict against Potomac Edison on its *Mandolidis* cross-claim against Carl Belt. The trial court also granted Hester's motion for directed verdict against Potomac Edison on its claim for indemnification under paragraph 7 of the 1982 agreement.

The court sent to the jury the question of Potomac Edison's liability to the Helmicks and the question of Hester's liability to Potomac Edison under paragraph 15 of the 1982 agreement. The jury returned a verdict of $473,232.84 in favor of Mr. Helmick and a verdict of $25,000.00 in favor of Ms. Helmick. Prejudgment interest brought the total to $515,621.86. The jury also found that Potomac was 40% liable, that Carl Belt was 60% liable, and that Mr. Helmick was not liable. On the basis of paragraph 15, the jury found Hester not liable.

The judge then ordered that Potomac Edison pay the full amount of the verdict.

I.

Potomac Edison now appeals to this Court with nine assignments of error. Hester cross-assigns three errors. Much of Potomac Edison's argument asks us to re-plow the ground that we covered in the recent case of *Miller*

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[3] *Mandolidis* claims take their name from this court's decision in *Mandolidis v. Elkins Industries, Inc.*, —— W.Va. ——, 246 S.E.2d 907 (1978). Ordinarily *Mandolidis* claims are brought by injured employees who seek to recover from their employers beyond the coverage of the Workers' Compensation system. To make such a recovery, the employee must prove that his employer acted with deliberate intention in exposing him to the hazard. In the present case, Potomac Edison seeks to recover *Mandolidis* damages as a cross-claim.

v. Monongahela Power Company, —— W.Va. ——, 403 S.E.2d 406 (1991). In *Miller*, we held that:

> In a consistent line of cases stretching back over nearly a century, we have held that electricity is an inherently dangerous instrumentality and that its management requires a peculiarly high level of care. In this regard, although we have never gone so far as to make electric companies insurers, we have come reasonably close by making it clear that any deviation from the highest possible standard of care is sufficient to impose liability.

Miller at ——, 403 S.E.2d at 411.

In *Miller*, we also noted:

> A company maintaining an electric line, over which a current of high and dangerous voltage passes, in a place to which it knows or should anticipate others lawfully may resort for any reason, such as business, pleasure or curiosity, and in such manner as exposes them to danger of contact with it by accident or inadvertence, is bound to take precautions for their safety by insulation of the wire or other adequate means. Syllabus Point 2, *Love v. Virginian Power Co.*, 86 W.Va. 393.

Miller at ——, 403 S.E.2d at 411.

Today, we reaffirm these holdings. The jury could reasonably have found that Potomac Edison acted negligently when it did not remove the guy wire *or* move the utility pole at Carl Belt's request, and that Potomac was negligent when it put up this terminal utility pole with the guy wire and the electrical wires on the same side.[4]

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[4] As the testimony at trial showed, the standard for terminal utility poles (even those in Potomac Edison's own materials) is that the guy wire and the electrical wires be placed on opposite sides of the utility pole.

II.

Potomac Edison's first three assignments of error involve Carl Belt and its immunity from suit under West Virginia Workers' Compensation. Although Mr. Helmick dropped his *Mandolidis* claim against Carl Belt before trial, Potomac Edison continued to pursue its *Mandolidis* cross-claim at trial. Potomac Edison claims that the trial court should not have directed a verdict against it on this claim.

The West Virginia Workers' Compensation Act provides compensation to employees injured at their work place while also protecting employers from civil litigation by injured employees. There is an exception to this immunity, however, when the employee's injury is the result of the employer's "deliberate intention" to cause that injury. The legislature has codified the "deliberate intention" standard in *W. Va. Code*, 23-4-2(c)(2) [1983], which provides in pertinent part:

> The immunity from suit provided under this section and under § 6-A [§ 23-2-68], article II of this chapter, may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention." This requirement may be satisfied only if:
>
> (i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or
>
> (ii) The trier of fact determines, either through specific findings of fact made by the court in a trial

without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the work place which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such unspecific [*sic*] unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with the statute, rule, regulation or standard generally requiring safe work places, equipment or working conditions;

(D) That notwithstanding the existence of facts set forth in sub-paragraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

In the case before us, Potomac Edison asserts that its claim under sub-section (ii) should have been allowed to go to the jury.

The "deliberate intention" exception to the Workers' Compensation system is meant to deter the malicious em-

ployer, not to punish the stupid one. Carl Belt was indeed negligent in allowing the events that led up to this accident to occur, but it was not malicious.

The evidence showed that Carl Belt did not realize the danger, and that, in fact, some of Carl Belt's supervisory personnel took part in the moving of the guy wire on several occasions. Potomac Edison offered no evidence of the violation of a safety statute or of a commonly accepted practice within the industry and certainly no evidence that Carl Belt intentionally exposed Mr. Helmick to this harm. Therefore, Potomac Edison did not meet at least three of the elements required by *W. Va. Code*, 23-4-2 [1983], to show "deliberate intention."

W. Va. Code 23-4-2(c)(2)(iii)(B) [1983] specifically provides:

> [for] prompt judicial resolution of issues of immunity from litigation under this chapter. . . . The court shall dismiss the action upon a timely motion for directed verdict . . . if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court shall determine that there is not sufficient evidence to find each and every one of the facts required to be proven . . .

Consistent with the legislature's command of prompt judicial resolution when appropriate, the trial court directed a verdict against Potomac Edison on its *Mandolidis* cross-claim, and we find no error.[5]

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[5] The case at hand is clearly different from this court's recent decision in *Mayles v. Shoney's, Inc.*, —— W. Va. ——, —— S.E.2d —— (No. 19530 filed December 20, 1990), which appellant cites to us. In *Mayles* the plaintiff was made to carry a hot bucket of grease out of the restaurant and down a steep grassy slope to a disposal area. The manager knew that such conditions existed and consciously appreciated that such conditions were dangerous, but did not act to change the conditions.

Potomac Edison next claims that if it is deprived of its right of contribution and indemnity under the West Virginia Workers' Compensation Act, then the Act violates the due process clause of the *Constitution of the United States* and *W. Va. Const.*, art. III, § 17, which insures access to the courts. This argument is squarely addressed in our recent decision of Miller, *supra*. As we stated in syllabus point 5 of *Miller*:

> The combination of: (1) West Virginia's system of comparative negligence; (2) West Virginia's rules on joint and several liability; and, (3) West Virginia's statutory workers' compensation immunity does not violate federal due process and equal protection principles.

Although Potomac Edison presents a good argument from a strictly logical point of view, its argument would require us to overturn over one hundred years of American tort law. Again,

> [t]herefore, notwithstanding the novelty, ingenuity and even logic of [Potomac Edison's] argument, we decline to rewrite the entire tort law of West Virginia in one fell swoop based on supposed federal principles without explicit federal direction.

Miller at ——, 403 S.E.2d at 414.

Potomac Edison next offers an "equitable" solution that would allow a set-off from its claim by the lesser of Workers' Compensation benefits paid to Mr. Helmick or the percentage of negligence assigned to Carl Belt. Such a rule in this case would allow Potomac Edison to set off $53,760. Potomac Edison admits there is no West Virginia precedent for such an "equitable" solution, and we decline to develop such a new rule today.

III.

On appeal Potomac Edison bases its claims against Hester on paragraph 7 of the 1982 agreement which provides:

> That the customer [Hester] agrees to at all times indemnify or save harmless the company [Potomac Edison] from and against all claims, demands, suits, actions and judgments and from and against all costs, expenses, pecuniary or other loss that may arise out of any damage, injury or loss of or to person, life and (or) property caused by any act or omission of the customer [Hester], its agents, servants and employees, and particularly caused by improper installation or defective equipment and (or) the operation of any equipment; but the customer [Hester] will not be responsible for or on account of, nor will it indemnify or save harmless the company [Potomac Edison] from and against, any such claim, demand, suit, action, judgment, cost, expense or loss that may arise out of any such damage, injury or loss caused by the sole negligence of the company [Potomac Edison], its agents, servants and employees. . . .

Paragraph 7 is part of Potomac Edison's standard contract that it requires of commercial customers. An adhesion contract is generally defined as one "drafted unilaterally by a business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere." *Jones v. Dressel*, 623 P.2d 370, 374 (Colo. 1981); *see also Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129 (4th Cir. 1967); *Ponder v. Blue Cross of Southern California*, 193 Cal. Rptr. 632, 145 Cal.App.3d 709 (1983); *Cushman v. Frankel*, 314 N.W.2d 705 (Mich. App. 1981); *Zuckerberg v. Blue Cross and Blue Shield of Greater New York*, 464 N.Y.S.2d 678, 119 Misc.2d 834 (1983).

In monopoly situations, the buyer is not able to negotiate contract terms freely, as it would be able to do in ordinary business situations. The 1982 agreement that Potomac Edison required Hester to sign in order to obtain electricity is a contract of adhesion.

We have previously addressed the question of adhesion contracts that require arbitration. While holding such contracts ordinarily enforceable, we found an exception where a gross disparity in bargaining power resulted solely from the monopolistic position of one of the parties. *Board of Education v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977).

The Supreme Court of Virginia has addressed the issue in this case more directly, finding:

> Where a *public duty* is involved, a public service company cannot relieve itself, either directly or indirectly, from liability to one whom the duty is owed.

Richardson-Wayland Electrical Corp. v. Virginia Elec. & Power Co., 219 Va. 198, 247 S.E.2d 465, 467 (1978) (emphasis added).

We find the reasoning of the Virginia Supreme Court persuasive, and today adopt a similar rule. Contracts of adhesion by which monopolies require indemnification for incidents in which the monopoly is at fault are void as against public policy.

IV.

Potomac Edison's fifth, sixth and eighth assignments of error involve evidence. The circuit court did not allow John St. Clair to testify as an expert witness on behalf of Potomac Edison. As Potomac Edison notes in its brief:

> The other parties objected because Mr. St. Clair was disclosed as a witness after a discovery cutoff deadline of July 3, 1989. However, two other witnesses, specifically William E. Johnson, an economist, and Stephen Townsend, a psychologist were also noticed after the discovery cutoff date and the other parties made no objection to their testimony.

Potomac Edison brief at 42.

What Potomac Edison failed to note in its brief was that Mr. Johnson and Mr. Townsend were disclosed as expert witnesses on July 10, 1989, one week before the beginning of the trial. Mr. St. Clair's appearance, on the other hand, was noticed only by fax to opposing counsels' offices on the Sunday before the opening of trial on Monday morning.

We stated in *Hulmes v. Catterson*, —— W.Va. ——, 388 S.E.2d 313 (1989), quoting from Syllabus Point 3 of *Michael v. Henry*, —— W.Va. ——, 354 S.E.2d 590 (1987):

> Under *W. Va. R. Civ. P.* 26(b)(4)(A)(i), "a party is required to disclose to another party the identity of persons whom that party intends to call as expert witnesses at trial only when that party has determined *within a reasonable time before trial* who his expert witnesses will be" (emphasis added).[6]

As a matter of law, notice of an expert witness by fax to a law office that will in all likelihood be empty,[7] on a Sunday less than twenty-four hours before the trial is to begin on Monday morning is not made *within a reasonable time before trial.*

Potomac Edison also assigns error to the refusal of the trial court to strike the testimony of Dr. Clarence E. Jones, plaintiffs' expert. Rule 703 of the *W. Va. R. Evid.* [1985] provides as follows:

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[6] Potomac Edison refers us, instead, to a footnote in that same opinion where we quoted from the Advisory Committee note to the *Fed. R. Civ. P.* which states: "Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be." Because Potomac Edison is so careful in reading footnotes, we note here for them that we generally consider the points that we put in the text to be more important than those we relegate to footnotes.

[7] By happenstance, one of the opposing lawyers was in his office on this particular day.

> The facts or data in the particular case on which an expert bases on opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in their field in forming opinions or inferences upon the subjects, the facts or data need not be admissible evidence.

Potomac claims that Dr. Jones' testimony was inadmissible because his testimony referred to the 1977 National Electrical Safety Code instead of the 1984 National Electrical Safety Code, and because he relied upon one of Potomac Edison's Transmission and Distribution manuals that came into effect after the accident occurred. Based on these data, and his other expertise, Dr. Jones testified essentially that Potomac Edison was negligent for not installing an insulator on the guy wire and for installing the guy wire on the same side of the utility pole as its high voltage equipment. After his testimony, counsel for Potomac Edison had ample opportunity to cross-examine Dr. Jones on his opinion and on the basis for his opinion. The jury was then able to consider Dr. Jones' testimony for what it was worth.

The admissability of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong. The trial court's refusal to strike Dr. Jones' testimony was within his sound discretion.

Potomac Edison's eighth assignment of error is that the trial court should not have admitted photographs of Mr. Helmick's injuries because the photographs were gruesome and because the photographs were of areas in which Mr. Helmick admitted that he experienced no pain. We find this claim incredible. Although Mr. Helmick may have suffered no pain in the regions photographed, the photographs offered other evidence. They could have shown the extent of cosmetic damage to Mr. Helmick, and they could have demonstrated the extent of his injury and the degree of his disability.

As we noted in Syllabus Point 6 of *Miller, supra*:

> A trial court is afforded wide discretion in determining the admissability of photographic evidence.

Admission of this photographic evidence was clearly within the sound discretion of the trial court.

V.

Potomac Edison's seventh assignment of error is that the trial court erred in failing to reduce the damages awarded to Mr. Helmick because of Mr. Helmick's failure to mitigate damages. Before the accident, Mr. Helmick was a strong, able-bodied laborer with a grade school education and an IQ in the low 80's. Now Mr. Helmick has a grade school education, an IQ in the low 80's, but has only one arm and no longer can do heavy manual labor. Yet Potomac Edison claims that Mr. Helmick could have obtained other employment after he was laid off by Carl Belt but that he did not attempt to do so. Perhaps Mr. Helmick should have looked for work as a door stop in Southern California? We think not.

Determining damages is the job of the jury and, as we held in Syllabus Point 6 of *Roberts v. Stevens Clinic Hosp.*, —— W.Va. ——, 345 S.E.2d 791 (1986):

> Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption.

Before the accident, Mr. Helmick performed manual labor such as digging ditches. Unfortunate as the circumstances are, there is not a great need in West Virginia for one-armed ditch diggers. Potomac Edison was free to offer evidence of Mr. Helmick's failure to mitigate his damages and was free to catalogue at length all of the high paying jobs available to him in the Greater

Hardy County Metropolitan area. Perhaps if Potomac Edison had offered such evidence or evidence that it had offered Mr. Helmick a job but that he had refused, the jury would have found the damages to be lower. As the evidence was, the jury was entitled to find that Mr. Helmick was completely disabled and *unable* to find other work.

VI.

Potomac Edison's final assignment of error pertains to supposed irregularities in the makeup of the jury. Potomac Edison tendered an affidavit of a private investigator who alleged irregularities with the jury. Even if we assume that these allegations are true, we find no grounds for a new trial. First, Potomac Edison alleges that because two of the jurors were married, the jury was prejudiced against Potomac Edison. We find no merit in this claim.

Second, Potomac Edison claims that because one of the juror's spouses had been killed in an industrial accident, the jury was biased against Potomac Edison. Potomac Edison was allowed to request inquiry into such matters on voir dire and did not do so. It is not the province of this Court to do for appellants on appeal what their lawyers did not do on voir dire. We hold, therefore, that the makeup of the jury was not prejudicial to appellant, Potomac Edison.

VII.

Appellee Hester cross-assigns three errors, two of which are no longer relevant.

Hester's third claim is that the trial court erred in not granting its attorneys' fees and court costs because Potomac Edison erroneously represented that Hester owned the utility pole involved in the accident. As we noted in Syllabus Points 2 and 3 of *Sally-Mike Properties v. Yokum*, —— W.Va. ——, 365 S.E.2d 246 (1986):

> As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement. [But]
>
> There is authority in equity to award to the prevailing litigant his or her attorney's fees as "costs," without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

The evidence shows that Potomac Edison did not act in bad faith, vexatiously, wantonly, or for oppressive reasons. Indeed, our opinion demonstrates that Potomac Edison had one claim against Hester that was worthy of review by this court.

VIII.

Therefore, for the reasons set forth above, the judgment of the Circuit Court of Hardy County is affirmed.

Affirmed.

APPENDIX B

IN THE CIRCUIT COURT
OF HARDY COUNTY, WEST VIRGINIA

Civil Action 88-C-118

JOE D. HELMICK and TAMMY HELMICK,
Plaintiffs,

v.

POTOMAC EDISON COMPANY, a Maryland Corporation, and CARL BELT, INC., a Maryland Corporation, HESTER INDUSTRIES, a corporation,
Defendants.

JURY ORDER

On a previous date, July 10, 1989 came the plaintiffs, Joe D. Helmick and Tammy Helmick, in person, and by their attorneys, Donald E. Cookman and Frank E. Simmerman, Jr., and came the defendants, Potomac Edison, through its counsel, Clarence E. Martin, III, Hester Industries, Inc., through its counsel, Joseph A. Wallace, Paul J. Harris, Esquire, and Carl Belt, Inc., by Charles R. Smith.

Thereafter, on July 10, 1989, the following jury was selected and sworn to well and truly try all issues herein:

1. Carol R. Hefner;
2. Lou Ann Miller;
3. Mark S. Roomsburg;
4. Samuel D. Miller, Jr.;
5. Rodney L. Tunsing;
6. Chester R. Tharpe.

The following jurors were selected and sworn to serve as alternates:

1. Marcia Fisher Rudolph;

2. Diana S. Hypes.

Thereafter, on July 17, 19, 20, and 21, 1989, evidence was presented, on its motion Carl Belt, Inc. was dismissed as a party to which objections were saved, and after the Court excused both alternate jurors, the jury retired into their chambers for deliberations.

After some time, the jury returned into the Court, and upon their oaths, returned the following verdict:

VERDICT FORM

No. 1 Do you find that the Potomac Edison Company was guilty of negligence?

Yes X No ____

No. 2 If you answered No. 1 "Yes", do you also find that negligence was a proximate cause of Joe Helmick's injuries?

Yes X No ____

NOTE: If you answered "No" to either No. 1 or No. 2, the Foreman should now sign the Verdict Form and notify the Sheriff.

If you answered both No. 1 and No. 2 "Yes", then you should proceed to answer Nos. 3, 4, 5, 6, 7, 8, 9, & 10.

No. 3 Do you find that Joe Helmick was guilty of negligence?

Yes ____ No X

No. 4 If you answered No. 3 "yes, do you also find that negligence was a proximate cause of Joe Helmick's injuries?

Yes ____ No ____

No. 5 Do you find that Carl Belt, Inc. was guilty of negligence?

Yes X No ____

No. 6 If you answered "Yes" to No. 5, do you also find that negligence was a proximate cause of Joe Helmick's injuries?

Yes X No ____

No. 7 Using 100% to represent the total negligence of all parties to the accident, apportion the negligence among them:

JOE HELMICK	0 %
POTOMAC EDISON CO.	40 %
CARL BELT, INC.	60 %
TOTAL:	100 %

No. 8 State the total amount of damages which you find were sustained by Plaintiff Joe D. Helmick as a result of the occurrence. In determining the total amount of damages, you should not make any reduction because of the negligence, if any, of Plaintiff Joe D. Helmick.

$ 473,232.84

No. 9 State the total amount of damages which you find were sustained by Plaintiff Tammy Helmick as a result of the occurrence. In determining the total amount of damages, you should not make any reduction of the negligence, if any, of Plaintiff Joe D. Helmick.

$ 25,000.00

No. 10 Do you find that Hester Industries, Inc. breached Paragraph Fifteenth of its contract with The Potomac Edison Company

Yes ____ No X

/s/ Samuel D. Miller, Jr.
Foreman

Such verdict having been returned, it is accordingly ORDERED AND ADJUDGED, that the plaintiffs Joe D. Helmick and Tammy Helmick, shall recover of and from defendant Potomac Edison Company, the total sum of $498,232.84, plus their costs of this action.

It is further ORDERED that Potomac Edison Company shall recover nothing of defendant Hester Industries, Inc., and Hester Industries, Inc. shall recover of and from Potomac Edison Company, its cost of this action.

ENTER: July 26, 1989

/s/ John M. Hamilton
Judge

Submitted by:

/s/ Frank E. Simmerman, Jr.
FRANK E. SIMMERMAN, JR.,
Counsel for Plaintiffs

APPENDIX C

IN THE CIRCUIT COURT
OF HARDY COUNTY, WEST VIRGINIA

Civil Action 88-C-118

JOE D. HELMICK and TAMMY HELMICK,
Plaintiffs,

v.

POTOMAC EDISON COMPANY, a Maryland Corporation, and CARL BELT, INC., a Maryland Corporation, HESTER INDUSTRIES, a corporation,
Defendants.

ORDER AMENDING JUDGMENT

On this the 14th day of August, 1989, came the plaintiffs, by their counsel, Donald E. Cookman and Frank E. Simmerman, Jr., Hester Industries, Inc., by Joseph A. Wallace and Geraldine S. Roberts, and Potomac Edison Company by Clarence E. Martin, III, for hearing upon Plaintiffs' Motion for Additur for Prejudgment Interest previously served on August 2, 1989, and noticed for hearing this date.

Thereupon, Plaintiffs' Motion for Additur was presented to the Court, and predicated upon the case of *Grove v. Myers*, Supreme Court No. 18406, Plaintiffs moved for leave of Court to amend their Motion for Additur for Prejudgment Interest to allow for interest to be paid from the date of occurrence, or for thirty-three (33) months prior to entry of the jury verdict herein, July 21, 1989.

Thereupon, the Court heard arguments of counsel with respect thereto, and noted the specific objection of Potomac Edison Company that the Plaintiffs had failed to

timely seek such interest, and were precluded from seeking an Additur at this point.

After mature consideration, this Court is of the opinion that Plaintiffs' Motion for Additur for Prejudgment Interest shall be amended to award interest in accordance which such motion at Five Hundred Twenty Six Dollars and ninety-four cents ($526.94) for thirty-three (33) months, and the Plaintiffs are hereby awarded in addition to the Four Hundred Ninety Eight Thousand Two Hundred Thirty Two Dollars and eighty-four cents ($498,232.84) previously returned by jury verdict July 21, 1989, the sum of Seventeen Thousand Three Hundred Eighty Nine Dollars and two cents ($17,389.02), resulting in a total judgment which Plaintiffs Joe D. Helmick and Tammy Helmick shall recover of and from Defendant Potomac Edison Company, the sum of Five Hundred Fifteen Thousand Six Hundred Twenty One Dollars and eighty-six cents ($515,621.86), plus their costs of this action as taxed by the Clerk of the Court. Additional interest on such sums shall accrue as of August 1, 1989.

It is further ORDERED that Hester Industries, Inc. shall recover of and from Potomac Edison Company its costs of this action as taxed by the Clerk of this Court.

It is further ORDERED that a telephone conference shall be conducted September 7, 1989, at 11:30 a.m., at which time Potomac Edison Company's post-trial motions previously filed herein shall be considered. Attorney Donald E. Cookman shall initiate such conference calls.

ENTER: August 16, 1989

/s/ John M. Hamilton
HONORABLE JOHN M. HAMILTON

Submitted by:

/s/ Frank E. Simmerman Jr.
FRANK E. SIMMERMAN, JR.

APPENDIX D

IN THE CIRCUIT COURT
OF HARDY COUNTY, WEST VIRGINIA

Civil Action 88-C-118

JOE D. HELMICK and TAMMY HELMICK,
Plaintiffs,

v.

POTOMAC EDISON COMPANY, a Maryland Corporation, and CARL BELT, INC., a Maryland Corporation, HESTER INDUSTRIES, a corporation,
Defendants.

ORDER

On the 12th day of September, 1989, came the plaintiffs herein by their counsel, Frank E. Simmerman, Jr., defendant Potomac Edison by its counsel, Clarence E. Martin, III, Hester Industries, Inc. by its counsel, Joseph A. Wallace, and Carl Belt, Inc. by its counsel, Charles W. Smith, all pursuant to a telephone conference convened herein for hearing on Potomac Edison Company's Post-Trial Motions.

Having heard the arguments of counsel with respect thereto, and after mature consideration, this Court is of the opinion to and does hereby ORDER, that Potomac Edison Company's Post-Trial Motions, in their entirey, including but not limited to, Potomac Edison Company's Motion to Reimpanel the Jury, Motion to Set Aside Verdict, Motion to Set Aside Judgment and Award a New Trial, and Motion to Amend Judgment, are hereby DENIED.

Potomac Edison Company's objections and exceptions to the Court's rulings herein are expressly noted.

ENTER: Oct. 6, 1989

/s/ John M. Hamilton
JOHN M. HAMILTON
Judge

APPENDIX E

IN THE CIRCUIT COURT
OF HARDY COUNTY, WEST VIRGINIA

Civil Action 88-C-118

JOE D. HELMICK and TAMMY HELMICK,
Plaintiffs,

v.

POTOMAC EDISON COMPANY, a Maryland Corporation, and CARL BELT, INC., a Maryland Corporation, HESTER INDUSTRIES, a corporation,
Defendants.

ORDER

On the 4th day of May, 1990, came the plaintiffs, Joe D. Helmick and Tammy Helmick, in person, and by their counsel, Frank E. Simmerman, Jr. and Donald E. Cookman, defendant Hester Industries, Inc., by Joseph A. Wallace, Potomac Edison Company by Clarence E. Martin, III, and defendant Carl Belt, Inc., by Charles W. Smith for hearing on Potomac Edison Company's Motion pursuant to West Virginia Rules of Civil Procedure 60(b) and Motion to Reassemble Jurors, Set Aside the Verdict and Award a New Trial, pursuant to West Virginia Rule of Civil Procedure 60(b), both served April 27, 1990.

After mature consideration, and further noting that these matters were previously raised and ruled upon by this Court in Plaintiffs' Post-Trial Motions served July 31, 1989, and denied by this Court in its Order entered October 6, 1989, this Court hereby reaffirms its prior

Order and further ORDERS that the Motion of Defendant Potomac Edison Company pursuant to West Virginia Rule of Civil Procedure 60(b) and Motion of Defendant Potomac Edison Company to Reassemble Jurors, Set Aside the Verdict and Award a New Trial, served April 27, 1989, are each hereby denied.

This Court further ORDERS that the demands of Joe D. Helmick and Tammy Helmick, as well as Hester Industries, Inc., for their costs and expenses incurred in responding to and appearing in opposition to these renewed Post-Trial Motions are hereby denied.

The objections of each party to any and all adverse rulings are hereby noted.

It is agreed and ordered that the expiration of the time to apply for an appeal is 6 June, 1990.

Enter: 5/15/90

/s/ John M. Hamilton
HONORABLE JOHN M. HAMILTON

Submitted by:

/s/ Frank E. Simmerman, Jr.
FRANK E. SIMMERMAN, JR.

APPENDIX F

WEST VIRGINIA CODE § 23-2-6

§ 23-2-6. Exemption of contributing employers from liability.

Any employer subject to this chapter who shall subscribe and pay into the workmen's compensation fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided, shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which such employer shall not be in default in the payment of such premiums or direct payments and shall have complied fully with all other provisions of this chapter. The continuation in the service of such employer shall be deemed a waiver by the employee and by the parents of any minor employee of the right of action as aforesaid, which the employee or his or her parents would otherwise have: Provided, that in case of employers not required by this chapter to subscribe and pay premiums into the workmen's compensation fund, the injured employee has remained in such employer's service with notice that his employer has elected to pay into the workmen's compensation fund the premiums provided by this chapter, or has elected to make direct payments as aforesaid. (1913, c. 10, § 22; 1915, c. 9, § 22; 1919, c. 131, § 22; Code 1923, c. 15P, § 22; 1974, c. 145.)